Supreme Court, U.S.
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No. 89-1352

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Fred Hass,
Petitioner,

v.

OREGON STATE BAR,
Respondent.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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I. ARGUMENT IN REPLY

A. Petitioner's Claims Are Not Moot.

Nothing in the record establishes that Petitioner elected inactive status. Respondent's introduction of new facts before this Court is inappropriate without a motion pursuant to Sup. Ct. R. 21 to augment the record. If such a motion is allowed, Petitioner has the right to do the same and rebut said factual allegations with an affidavit of his own stating his intent to continue as a member of the Oregon State Bar, and his intent to continue to practice law in the state of Oregon.

In any event, if Petitioner chose to become inactive, this does not extinguish his rights as a member of the Oregon State Bar. Inactive members have the same rights as active members, except they cannot hold office or vote.

ORS 9.180 states in relevant part:

> "Inactive members shall not hold office or vote, but they shall have such other privileges as the board may provide."

Section 3.3 of the Bylaws of the Oregon State Bar states:

> "Subject to the other provisions of these Bylaws, all members have equal rights and privileges except that only active members shall hold office in, vote on or be appointed to any committee or section of the Bar."

Changing from inactive to active status requires merely the filing of an informal application and paying, among other fees, the Bar's primary malpractice coverage. Bar Rule 8.2. Consequently, even as an inactive member, Petitioner is prevented from being reinstated unless he purchases primary malpractice insurance from the Bar. This is a deprivation of a present right which presents a live controversy under Article III of the U.S. Constitution.

Even assuming Petitioner's inactive status somehow limits his present right to bring this action against the Bar, the test for Article III jurisdiction requires only that there be a "reasonable likelihood that [Petitioner] will again suffer the deprivation." *Honig v. Doe*, 484 US 305, 318 (1988). See, e.g., *California Coastal Comm'n v. Granite Rock Co.*, 480 US 572, 578 (1987) ("likely" that respondent would again submit mining plans that would trigger contested state permit requirement); *United States Parole Comm'n v. Geraghty*, 445 US 388, 398 (1980) (case not moot where litigant "faces some likelihood in becoming involved in same controversy in future").

B. Bar is Supervised Only By Itself.

Respondent argues over and over again that the Fund is actively supervised by the Bar. Respondent misses the point. The Fund is the Bar. It cannot supervise itself.

Although Respondent implies that there is a link between the Bar and the Oregon Legislature, Respondent points to none. There is no link. The Bar runs its insurance monopoly without having to answer to anything or anyone.

C. The McCarran-Ferguson Act Does Not Apply To The Bar's Resolution.

The Court of Appeals' dissent first questions whether the Bar's resolution constitutes the business of insurance exempting it from the McCarran-Ferguson Act. The dissent states:

> "Even assuming the administration of the Fund does not constitute the business of insurance, the Bar cannot invoke the McCarran-Ferguson exemption as the Bar's insurance-related activities are not "regulated" by state law under Section 2(b) of the Act and the Bar's rules concerning the operation of the Fund involve "coercion" within the meaning of Section 3(b) of the Act." Petition for Certiorari, App. at 30a.

Coercion alone, if established, will eliminate the McCarran-Ferguson exemption.

Section 3(b) of the McCarran-Ferguson Act, 15 USC Section 1013 (1982) states in relevant part:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

As the dissent correctly states:

> "Pursuant to the Bar's regulations, all active members in the private practice of law, with the exception of patent attorneys, are required (1) to carry professional liability insurance and (2) to purchase such insurance from the Bar. *See* Board of Governors' Resolution, paragraphs 1-2. In other words, in order to practice law in the State of Oregon, private attorneys, including Hass, are not only compelled to carry insurance, but are forced to take their insurance business to one particular insurer—the Bar. The plain meaning of the term "coercion" is clearly implicated where, as here, an individual's ability to pursue her livelihood is conditioned upon her willingness to deal with one particular insurer, to the exclusion of all other potential insurers. Indeed, it is difficult to envision a more coercive practice then the one at issue in this case." Petition for Certiorari, App. at 34a.

Respondent's only response is that coercion was not alleged. Respondent's Brief in Opposition at 19. However, under notice pleading simply alleging the word "coercion" in a pleading is insufficient. *Chamberlin Mach. Works v. United States*, 270 US 347, 349 (1926). One must allege facts giving rise to coercion. *Id.* Petitioner did so numerous times in his Complaint. Petitioner's Complaint, paragraph 7, 9, 11, 17, 22, 24, 26. In addition, Respondent has agreed to the facts giving rise to coercion by stipulation. As the Stipulation states

"Plaintiff, together with all attorneys in private practice in Oregon, are required to participate in the Professional Liability Fund Plan. Failure to participate shall result in suspension from membership in the Bar pursuant to ORS 9.200." Stipulation, Respondent's Brief in Opposition at 3a-4a.

D. The Bar Should Be Treated As A Private In-State Insurance Company.

Petitioner does not contend that the Fund should be deemed a separate private entity. For purposes of Commerce Clause scrutiny, however, the Bar's insurance monopoly should be treated as a private insurance company.

The state of Oregon created its own insurance company. The state then required its citizens to purchase insurance from the state's company to the exclusion of all other competitors. The result is an insurance monopoly. The point is, if the Bar's monopoly is allowed, what is to stop states from creating monopolies in other service and good industries by requiring citizens to purchase those respective goods and services from state-run monopolies. In other words, a state could effectively create economic barriers at its borders to prevent competition. This economic protectionism is at the heart of what the Commerce Clause was aimed at preventing.

II. CONCLUSION

Petitioner's claims are not moot, and the McCarran-Ferguson Act does not apply to the Bar's anti-competitive conduct. Petitioner prays the Court to grant the Writ.

RESPECTFULLY SUBMITTED this 27th day of March, 1990.

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SUPPLEMENT APPENIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRED HASS,	)	
	)	Civil No. 87-196-JU
Plaintiff,	)	
	)	ORDER
v.	)	
	)	
OREGON STATE BAR,	)	
	)	
Defendant.	)	

JUBA, Magistrate:

Plaintiff seeks a declaration that the Oregon State Bar Board of Governors' resolution requiring practitioners to carry professional liability insurance purchased through the Bar is unconstitutional under the Commerce Clause of the United States Constitution and violates the federal antitrust laws. I find for the defendant on both claims.

BACKGROUND

Plaintiff Fred Hass is an active member in good standing of the Oregon Bar. Defendant is the Oregon State Bar Association. The parties have stipulated as follows:

> In 1977 [sic 1975], the Legislative Assembly passed an Act, subsequently codified as ORS 9.080, which provides as follows:

> (2)(a) the board [Board of Bar Governors] shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyers professional liability fund.

The parties have also stipulated that:

In 1977, the Board of Bar Governors passed a resolution providing in part as follows:

> 1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law in Oregon shall carry professional liability coverage with aggregate limits of not less than $100,000...
>
> 2. Such professional liability coverage for all active members engaged in the private practice of law in Oregon, except patent attorneys, shall be obtained through the Oregon State Bar Professional Liability Fund....

A. *Antitrust Claims*

Defendant contends that the establishment and maintenance of the Professional Liability Fund was mandated by statute and is exempt from federal antitrust liability under the state action doctrine. The doctrine exempts from the antitrust laws actions by the state

such as the passage of laws by the legislature or promulgation of rules by the state Supreme Court acting in its legislative capacity. *Hoover v. Ronwin*, 466 U.S. 558, 567-68, 104 S. Ct. 1989, 1994-95, 80 L.Ed.2d 590 (1984). The doctrine is grounded in the history and language of the Sherman Act, which suggest that the Act was not intended as a limit on the actions of a state. *See Parker v. Brown*, 317 U.S. 341, 350-51, 63 S. Ct. 307, 313, 87 L.Ed. 315 (1943).

When the challenged activity is not undertaken directly by the legislature or the Supreme Court, but rather is carried out by others pursuant to state authorization, "closer analysis" is required. *Hoover*, 466 U.S. at 568, 104 S. Ct. at 1995. "In such cases, it becomes important to assure that the anticompetitive conduct of the state's representative was contemplated by the state." *Id.* "To acquire antitrust immunity, such conduct must be taken pursuant to a clearly articulated and affirmatively expresed [sic] state policy and must be subject to active supervision by the state." *Patrick v. Burget*, 800 F.2d 1498, 1505 (9th Cir. 1986), *citing Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 1727, 85 L.Ed.2d 36 (1985); *Hoover*, 466 U.S. at 569, 104 S. Ct. at 1995; *Llewellyn v. Crothers*, 765 F.2d 769, 773 (9th Cir. 1985).

To demonstrate "clear articulation," the defendant need not point to specific authority for anticompetitive activity. It is enough that the defendant show that the legislature contemplated the kind of activity of which plaintiff complains. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 1719, 85 L.Ed.2d 24 (1985). In other words, it must be clear that the legislature intended to replace competition with regulation in the relevant market. *Southern Motor Carriers*, 105 S. Ct. at 1731.

The State of Oregon has articulated an intent to replace competition with regulation in the field of minimum legal malpractice insurance. The enabling statute, ORS 9.080, empowers the Board of Bar Governors to require all Bar members to carry malpractice insurance. The statute further empowers the Board to do whatever

is necessary and convenient to implement the provision, including the "authority to own, organize and sponsor any insurance organization...." The legislature clearly contemplated the possibility that the Bar would require all members to purchase minimum malpractice insurance coverage from an insurance organization owned by the Bar. The legislature therefore intended to displace competition with regulation in this market.

The Professional Liability Fund is actively supervised by the State. ORS 9.010(1) provides that the Oregon State Bar is a public corporation and an instrumentality of the Judicial Department of the State of Oregon. The Oregon legislature established the Board of Governors and charged it with the executive functions of the Oregon State Bar. ORS 9.025; 9.080(1). The Board of Bar Governors derives its authority from the State. 44 Op. Atty. Gen. 336, 338 (1985). The Board exercises a portion of the sovereign power of the State. ORS 9.070-.110. Each member of the Board of Governors is also a state officer. 44 Op. Atty. Gen. 336, 338 (1985). The Board of Governors' policies and procedures ensure that the program is actively supervised. Section 14.300 requires the Professional Liability Fund to provide the Board with the following on a regular basis:

> "A. All financial statements upon their completion;
>
> B. All proposed changes to bylaws, policies and procedures 30 days before the first scheduled vote for adoption;
>
> C. All minutes of meetings of the Board of Directors of the PLF or committees of the Board, excepting those parts which are made confidential by ORS 9.080(2((a);
>
> D. All reports of investment performance and changes in investments;
>
> E. All proposed changes in the cover-

the first scheduled vote for adoption, with an explanation of the reasons for and effects of the changes;

G. All closed claim reports prepared in a manner consistent with the confidentiality requirements of ORS 9.080(2)(a);

H. All projections, forecasts, prospective financial statements and the like prepared by or for the PLF;

I. Any other information as may be requested by the BOG to assist it in discharging its responsibility to the membership of the Bar."

In addition, the Board votes on the adoption of any change in plan coverage proposed by the Professional Liability Fund. The Board retains the authority to deny any proposed assessments for insurance coverage presented by the Fund.

Because the establishment of the Professional Liability Fund and the elimination of competition in the provision of minimum legal malpractice insurance was clearly contemplated by the State legislature, and is actively supervised by the State, the Board of Bar Governors' resolution challenged here is exempt from the federal antitrust laws by virtue of the state action doctrine.

B. *The Commerce Clause*

The Commerce Clause of the Constitution contains an implied limitation on the power of the states to interfere with or impose burdens on interstate commerce. *Western and Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648 (1981). The test for determining when a state regulatory scheme violates the Commerce Clause is set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 90 S.Ct. 844, 25 L.Ed.2d 174 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits....If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The "heart of the Commerce Clause" is whether the local benefits to be served by the regulation outweigh the burden imposed on interstate commerce. *Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed.2d 326 (1977).

The resolution at issue regulates evenhandedly in that it requires all private practitioners to obtain primary legal malpractice insurance through the Professional Liability Fund rather than from another insurer. The resolution "visits its effects generally upon both interstate and local businesses" in the same manner and to the same degree.

The Board's resolution unquestionably effectuates a legitimate public interest in ensuring that the public is adequately protected from harm resulting from legal malpractice. In addition, the compulsory aspect of the Bar's insurance plan protects the public interest by ensuring that attorneys are able to obtain insurance coverage for the practice of law, thereby increasing the number of attorneys available to serve the public.

The local public interest served by the State's professional liability insurance program outweighs the burden on interstate commerce.

CONCLUSION

Plaintiff's request for declaratory and injunctive relief is denied. This action is dismissed.

Dated this 12 day of June, 1987.

/s/ George E. Juba
United States Magistrate